NO. 45540-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of

STATE OF WASHINGTON,

Respondent,

v.

PAUL ANDREW GEIER,

Petitioner.

STATE OF WASHINGTON'S RESPONSE TO BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

Respondent, State of Washington, by and through its attorneys, Robert W. Ferguson, Attorney General, and Kristie Barham, Assistant Attorney General, submits this response to Mr. Geier's Brief in Support of Personal Restraint Petition (PRP) in accordance with RAP 16.9. This response is supported by the records and files in this proceeding and by the following appendices:

Appendix 1: Email from Mr. Geier's trial counsel, dated January 31, 2011 (CP 637-40; CP 701)

Appendix 2: Declaration from Kristie Barham

Appendix 3: *In re Det. of Geier,* 2013 WL 1489825

Appendix 4: May 18, 2010 Deposition of Dr. Halon

Mr. Geier received effective assistance of trial counsel where counsel made a legitimate and strategic decision to call Dr. Halon as an expert witness at trial. Under the totality of circumstances, calling Dr. Halon as an expert witness was reasonable under prevailing professional norms, and was a decision reached by many other defense attorneys who frequently use Dr. Halon as an expert witness in sexually violent predator trials. Mr. Geier was not prejudiced or deprived of a fair trial by brief testimony of a minor disciplinary issue of Dr. Halon that occurred twelve years prior to trial. In light of all the favorable testimony Dr. Halon and

other witnesses provided on Mr. Geier's behalf, Mr. Geier has not shown a reasonable probability that the trial would have been different. Furthermore, in the direct appeal, this Court held that Mr. Geier was not prejudiced by the questioning of Dr. Halon such that a new trial was warranted.

Mr. Geier also received effective assistance of appellate counsel, who appropriately used her professional judgment in deciding what issues to raise on appeal. The Constitution does not require appellate counsel to raise every colorable claim suggested by a client, and appellate counsel appropriately exercised her professional judgment by winnowing out weaker arguments and raising those she deemed more likely to prevail. Furthermore, appellate counsel appropriately informed Mr. Geier of the appellate process and how he could proceed pro se should he elect to pursue issues that she determined would not prevail.

Finally, Mr. Geier's appellate counsel accurately informed Mr. Geier that RAP 10.10(a) only permits filing a statement of additional grounds for review in criminal cases. It is well established that sexually violent predator cases are civil in nature. RAP 10.10(a) does not violate Mr. Geier's due process or equal protection rights as there are valid reasons for treating sexually violent predators differently from criminal defendants. Mr. Geier's PRP should be denied.

II. ISSUES PRESENTED

1. Whether Mr. Geier received effective assistance of trial counsel where counsel's representation was a legitimate trial strategy that meets an objective standard of reasonableness under the totality of circumstances?

2. Whether Mr. Geier received effective assistance of appellate counsel where counsel appropriately used her professional judgment in deciding what issues to raise on appeal and where counsel appropriately informed Mr. Geier of the appellate process?

3. Whether Mr. Geier's due process and equal protection rights were protected where RAP 10.10(a) only permits filing a statement of additional grounds for review in criminal cases?

III. STATEMENT OF THE CASE

A. Sexually Violent Predator Trial

Mr. Geier has been convicted of three counts of rape of a child in the first degree involving four different boys. 7RP 221-22[1]. Rape of a child in the first degree is a sexually violent offense. RCW 71.09.020(17). During treatment, Mr. Geier admitted to sexually assaulting approximately twenty children over the years. 7RP 230-32. Most of his victims were prepubescent children and he offended against both boys and girls. 7RP 232-33. However, when Mr. Geier met subsequently met with the State's evaluator, Mr. Geier admitted to sexually assaulting a total of thirty-seven

[1] Citations to the Verbatim Report of Proceedings (VRPs) are as follows: 1RP - 5/27/08; 2RP – 8/29/08; 3RP – 7/30/10; 4RP – 5/23/11; 5RP – 5/24/11; 6RP – 5/25/11; 7RP – 5/26/11; 8RP – 5/31/11; 9RP – 6/1/11; 10RP – 6/2/11; 11RP – 6/6/11; 12RP – 6/7/11; 13RP – 6/8/11; 14RP – 6/9/11; 15RP – 6/13/11; 16RP – 6/14/11. This is the same citation system used by Mr. Geier and the State in the direct appeal.

individuals between the ages of two and twenty. 7RP 238-40. Mr. Geier testified at trial to molesting more than twenty victims ranging from age two to thirteen. 15RP 1471-72.

On the first day of Mr. Geier's sexually violent predator (SVP) trial, the trial court heard oral argument on the motions in limine (MIL) filed by the parties. 4RP 11, 35-36. The State's MIL #13 was to preclude references to any alleged prior bad acts or crimes of petitioner's witnesses under ER 608, ER 609, and ER 403. CP 666. The MIL requested that the court preclude such testimony until an offer of proof is made outside the presence of the jury. *Id.* The trial court granted this MIL, ruling that it applied to both the State's and Geier's witnesses. CP 563; 4RP 35-36.

On direct examination, Dr. Halon, Geier's expert, testified that he's been a licensed psychologist since 1977. 12RP 958. He also testified in detail about his qualifications and credentials as an expert witness. 12RP 958-69. On cross-examination, Dr. Halon clarified that his psychology license is in the State of California, not Washington. 13RP 1188. The State then questioned Dr. Halon about whether this license had ever been revoked. 13RP 1188-89. Dr. Halon testified that in 1999, he entered into a stipulated settlement with the State of California. 13RP 1189. Dr. Halon denied that his license was ever revoked. *Id.* Rather, he

testified that the disciplinary order stayed any revocation of his license. *Id.*

Dr. Halon testified that the stipulated settlement was based on a complaint filed against him by the California Board of Psychology in 1998. *Id.* When the State asked Dr. Halon whether there were four allegations in the complaint, Geier's counsel objected and asked to be heard outside the presence of the jury. *Id.* The State indicated that the question went to his credibility. *Id.* The court then excused the jurors. 13RP 1189-90.

Outside the presence of the jury, Geier's counsel argued that the State's cross-examination violated MIL #13. 13RP 1190-93. The State disagreed, arguing that the intent of MIL #13 had nothing to do with experts, but rather prior bad acts of witnesses that are referenced in ER 608 and ER 609. 13RP 1191-95. The State argued that the testimony is not a prior bad act under ER 608 or ER 609, but rather goes to Dr. Halon's credibility as an expert witness. *Id.* Geier's counsel asked for a mistrial, arguing that the State should have first made an offer of proof about the testimony. 13RP 1197.

Outside the presence of the jury, the trial court inquired as to the basis of Dr. Halon's disciplinary action and the nature of the allegations. 13RP 1194-95. The State advised that a complaint was filed against

Dr. Halon by the Board of Psychology regarding some allegations in 1999. 13RP 1194. Dr. Halon entered into a stipulated settlement and disciplinary order regarding the allegations. *Id.* The Board revoked his license, but stayed the revocation on the condition that he take an ethics course, pay a fine, undergo monitoring by another psychologist, and remain on probation for three years. *Id.* The specific allegations involved: (1) failure to report an act of sexual abuse reported to him by a patient due to his belief that everyone knew about the abuse and he was not required to report it; (2) errors in the coding on some billing issues; and (3) errors in reporting the results of some psychological tests he administered. 13RP 1195-96. The State advised the court that it did not intend to go into the specifics of the allegations as part of the cross-examination. 13RP 1194-95.

In denying Geier's request for a mistrial, the trial court noted that MIL #13 was never meant to be an "absolute prohibition" against evidence of prior bad acts and that it was following the intended procedure by hearing the offer of proof outside the presence of the jury. 13RP 1203-05. The court ruled that the "licensure missteps" at issue were not prior bad acts. *See* 13RP 1204. The court stated, "It is precisely the type of information that is allowed in order to have the jury fully and fairly evaluate the expert witness." 13RP 1204. The court allowed the State to

finish its cross-examination around the licensing issue, noting that if it did not question Dr. Halon on the specific allegations or other information helpful to Geier's case, that Geier could elicit that information on redirect examination. 13RP 1205.

The State continued its cross-examination of Dr. Halon. 13RP 1206-07. Upon questioning by the State, Dr. Halon testified that as a result of the stipulated settlement, he was placed on probation for three years and was required to pay a fine. 13RP 1206. He testified that he had to take an ethics course, which he would have had to take regardless of the settlement, and that his practice was monitored by another psychologist. 13RP 1207. Dr. Halon also testified that his psychology practice has "not been interrupted for a minute in the 30-something years I've had the license." *Id.* The State did not ask any further questions of Dr. Halon on this issue, and Geier did not ask any questions of Dr. Halon about the issue on redirect examination.

B. Procedural History

On June 14, 2011, Mr. Geier was committed as an SVP following a jury trial. Mr. Geier raised two issues in his direct appeal: (1) that the trial court violated his right to a public trial by sealing the juror questionnaires without conducting a *Bone-Club* analysis; and (2) that the

trial court erred by denying his motion for a mistrial after the State questioned Dr. Halon about a 1999 disciplinary issue. Appendix 3.

On April 9, 2013, this Court issued an unpublished decision affirming Mr. Geier's commitment as an SVP. *Id.* This Court held that the *Bone-Club* analysis did not apply because sealing juror questionnaires after trial was not a courtroom closure. *Id.* at 4. This Court also held that the trial court did not err in denying Mr. Geier's motion for a mistrial regarding the State's cross-examination of Dr. Halon over his disciplinary record. *Id.* at 2-3. This Court held that "the violation did not cause any prejudice, let alone prejudice for which a new trial is the only available remedy." *Id.* at 3.

On May 10, 2013, this Court denied Mr. Geier's motion for reconsideration. On August 13, 2013, a mandate was issued terminating the appeal. Mr. Geier timely filed a PRP.

IV. STANDARD OF REVIEW

In a PRP, the petitioner must show that he is being unlawfully restrained under one of the reasons enumerated in RAP 16.4(c). *In re Pers. Rest. of Cashaw,* 123 Wn.2d 138, 149, 866 P.2d 8 (1994); RAP 16.4. The petitioner should identify why the restraint is unlawful under the reasons specified in RAP 16.4(c) and why other remedies are inadequate. RAP 16.7(a)(2).

As a threshold matter, the petitioner must state the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. RAP 16.7(a)(2); *In re Rice,* 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). To obtain relief, the petitioner must show that he was actually and substantially prejudiced by the alleged error. *In re Pers. Rest. of Lord,* 123 Wn.2d 296, 303, 868 P.2d 835 (1994). If the petitioner fails to meet his threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed. *Rice*, 118 Wn.2d at 885.

"Bald assertions and conclusory allegations" are insufficient to meet the burden. *Id.* at 886. Rather, a petitioner must state with particularity the facts, which, if proven, would entitle him to relief. *Id.* "[A] mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient." *Id.* (emphasis in original). The petitioner must present evidence showing that his factual allegations are based on more than speculation or conjecture:

> If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify.

Id. If the petitioner does not provide facts or evidence and instead relies on conclusory allegations, the Court should refuse to reach the merits of the PRP. *In re Cook,* 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990); *see also In re Williams,* 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988).

If the issues presented are frivolous, the petition should be dismissed. RAP 16.11(b). If the petition cannot be determined solely on the record, the petition is transferred to the superior court for a reference hearing. *Id.* However, the purpose of the reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. *Rice,* 118 Wn.2d at 886. To obtain a hearing, petitioner must demonstrate that he has competent, admissible evidence to establish facts that would entitle him to relief. *Lord,* 123 Wn.2d at 303. Once the petitioner makes this threshold showing, the Court then examines the State's response. *Rice,* 118 Wn.2d at 885.

V. ARGUMENT

A. Mr. Geier Received Effective Assistance of Counsel at Trial Under the *Strickland* 2-Prong Test

Individuals subject to sexually violent predator (SVP) civil commitment proceedings have the right to effective assistance of counsel. *State v. Ransleben,* 135 Wn. App. 535, 540, 144 P.3d 397 (2006).

Washington has adopted the 2-prong test set forth in *Strickland v. Washington* for determining whether counsel was ineffective. *State v. Brett,* 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Under that test, the defendant must show (1) that counsel's performance was deficient; and (2) that such deficient performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

1. Trial Counsel's Representation Was a Legitimate Trial Strategy and Meets the Objective Standard of Reasonableness Under all the Circumstances

The first prong of the *Strickland* test requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *Brett,* 126 Wn.2d at 198. There is a strong presumption that counsel's representation was effective. *In re Davis,* 152 Wn.2d 647, 673, 101 P.3d 1 (2004); *see also State v. Piche,* 71 Wn.2d 583, 591, 430 P.2d 522 (1967) (where a court appoints a member of the bar to represent an indigent defendant, there is a strong presumption of counsel's competence that is only overcome by a clear showing of incompetence derived from the whole record). The petitioner can rebut this presumption by proving that his counsel's representation was unreasonable under prevailing professional norms and was not sound strategy. *Davis,* 152 Wn.2d at 673. Counsel's competency is determined based on the entire record below. *State v.*

McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Piche,* 71 Wn.2d at 591 ("the competence of counsel must be judged from the whole record and not from isolated segments of it").

Matters of trial strategy or tactics do not establish that counsel's performance was deficient. *In re Det. of Strand,* 139 Wn. App. 904, 912, 162 P.2d 1195 (2007); *In re Det. of Stout,* 128 Wn. App. 21, 28, 114 P.3d 658 (2005). If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as the basis for an ineffective assistance of counsel claim. *State v. Benn,* 120 Wn.2d 631, 665, 845 P.2d 289 (1993) (hereafter, *Benn I*); *see also State v. Renfro,* 96 Wn.2d 902, 909, 639 P.2d 737 (1982) ("This court has refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics."). The relevant question is whether counsel's choices were reasonable. *State v. Grier,* 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

An attorney is allowed wide latitude and flexibility in choice of methodology to be used, action to be taken or avoided, and trial tactics. *State v. Wilkinson,* 12 Wn. App. 522, 524, 530 P.2d 340 (1975); *see also Piche,* 71 Wn.2d at 590. Such flexibility is essential to skillful representation:

> If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off—indeed, in some instances, whether to interview some witnesses before trial or leave them alone—he will lose the very freedom of action so essential to a skillful representation of the accused.

Piche, 71 Wn.2d at 590.

An attorney's decision to call a witness is generally a matter of legitimate trial tactics that will not support a claim of ineffective assistance of counsel. *State v. Byrd,* 30 Wn. App. 794, 799, 638 P.2d 601 (1981). Although there are basic rights that the attorney cannot waive without the fully informed consent of the client, the attorney has full authority to manage the conduct of the trial. *Taylor v. Illinois,* 484 U.S. 400, 417-18, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988). "The adversary process could not function effectively if every tactical decision required client approval." *Id.* at 418. In general, a client must accept the consequences of tactical decisions made by his attorney. *Id.*

Strategic and tactical decisions are made by counsel, and counsel need only consult with clients on such decisions where "feasible *and appropriate.*". *See* ABA, *Standards for Criminal Justice: Defense Function* std. 4-5.2. (emphasis added). Decisions made by counsel include what witnesses to call, cross-examination, juror selection, what trial

motions to make, and what evidence to introduce. *Id.* An attorney is only required to "reasonably" consult with a client. *See* RPC 1.4(a)(2). Many trial decisions are made by the attorney, not the client. An attorney shall abide by a client's decision on whether to settle a matter or enter a plea, whether to waive a jury trial, and whether the client will testify. RPC 1.2(a); *see also* ABA, *Standards for Criminal Justice: Defense Function* std. 4-5.2. All other decisions are left to counsel. Mr. Geier's trial counsel was simply not required to raise issues that Mr. Geier himself deemed important. *See Piche,* 71 Wn.2d at 590 (finding that counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point or argue every point which in retrospect may seem important to the defendant).

The decision to call witnesses rests with counsel, not the client. *In re Pers. Rest. of Stenson,* 142 Wn.2d 710, 741, 16 P.3d 1 (2001). Mr. Geier argues that had he known about Dr. Halon's disciplinary history prior to trial, "he would have chosen a different expert." *See* Brief in Support of PRP (hereafter, PRP) at 20-21. However, as an indigent client, Mr. Geier did not have a constitutional right to retain the expert of his choice. *See Ake v. Oklahoma,* 470 U.S. 68, 77, 83, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985).

"A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom." *State v. Adams,* 91 Wn.2d 86, 91, 586 P.2d 1168 (1978). The relative wisdom of the decisions made by Mr. Geier's counsel should not be open for review after commitment. *See id.* Only when counsel's conduct "cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate." *Id.* The practice of law is not a science, and it is easy to second guess a lawyer's decisions with the benefits of hindsight:

> Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction.

Id.

Mr. Geier's counsel made an appropriate, strategic decision to call Dr. Halon as an expert witness at trial. Approximately six months prior to trial, Mr. Geier's counsel informed the State in an email that they knew

about Dr. Halon's disciplinary action from the 1990s. *See* Appendix 1[2]; *see also* 13RP 1198-99. Mr. Geier's counsel clearly made a strategic decision to keep Dr. Halon as an expert witness on Mr. Geier's case despite knowing about this one disciplinary issue more than a decade earlier. Many other defense attorneys have reached a similar decision as Dr. Halon testifies frequently for the defense in other sexually violent predator cases.[3] Clearly, counsel conducted a reasonable investigation of Mr. Geier's expert because she uncovered a minor disciplinary action that occurred *twelve years* prior to trial. There is nothing in the record indicating that counsel failed to adequately investigate Dr. Halon's

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[2] This email was part of the trial court record below and was designated as a Clerk's Paper. *See* CP 637-40; CP 701. The email references a "1995" disciplinary action. However, the year appears to be a typographical error, as the only disciplinary action known to the parties and testified to at trial involved Dr. Halon's "1999" disciplinary action. *See* 13RP 1189-1207.

[3] Dr. Halon has been retained as a defense expert on numerous SVP matters, including the following cases in Washington State: *In re Det. of Duncan,* 142 Wn. App. 97, 174 P.3d 136 (2007); *In re Det. of Mitchell,* 160 Wn. App. 669, 249 P.3d 662 (2011); *In re Det. of Reyes,* 176 Wn. App. 821, 315 P.3d 532 (2013); John Keeney; Maverick Lanning; Jason Muns; Jeffrey Payne; Michael Phillips; Steven Ritter; John Robinson; Samuel Sparks; and Wayne Thoday. *See* Appendix 2. Following is a list of unpublished cases in Washington, which are cited not as authority, but solely to show the cases in which Dr. Halon was retained as a defense expert: *In re Det. of Williams,* 2005 WL 3033373 (2005); *In re Det. of Love,* 2007 WL 1087558 (2007); *In re Det. of Bubb,* 2008 WL 2842549 (2008); *In re Det. of Mackey,* 2009 WL 3825852 (2009); *Robinson v. State,* 2009 WL 3172797 (2009); *In re Det. of Davenport,* 2010 WL 3034895 (2010); *In re Det. of Townsend,* 2011 WL 1005617 (2011); *In re Det. of Lopez,* 2012 WL 295462 (2012); *In re Det. of Hanson,* 2015 WL 540862 (2015). Dr. Halon is also retained frequently by the defense in California, *see e.g. People v. McRoberts,* 178 Cal.App.4th 1249, 101 Cal.Rptr.3d 115 (2009); *People v. Cheek, 2008* WL 5263647 (2008); *People v. Whaley,* 152 Cal.App.4th 968, 62 Cal.Rptr.3d 11 (2007); *People v. Segura,* 2008 WL 684563 (2008); *People v. Nguyen,* 2003 WL 205158 (2003).

background. Mr. Geier's claims to the contrary amount to mere speculation. Moreover, as the State explained to the trial court, Dr. Halon testifies about the disciplinary issue in basically every trial and has been doing so for years. 13RP 1192; *see also* Appendix 4 at 72-78. Thus, other defense attorneys reached the same tactical decision as Mr. Geier's counsel in calling Dr. Halon as a witness. Under *Adams,* counsel's decision cannot be considered inadequate. *See Adams,* 91 Wn.2d at 91.

Mr. Geier fails to satisfy the first prong of the *Strickland* test, which requires a showing that counsel's performance was deficient in light of all the circumstances. Based on all of the circumstances, counsel's representation did not fall below an objective standard of reasonableness. *See Brett,* 126 Wn.2d at 198. The decision of Mr. Geier's counsel to call Dr. Halon as an expert witness was a legitimate trial strategy that simply cannot serve as a basis for an ineffective assistance of counsel claim.

Mr. Geier's trial lasted more than three weeks and his counsel presented numerous witnesses who provided favorable testimony for Mr. Geier. *See* 11RP 878-908; 12RP 921-41, 952-57; 12RP 958-1051, 13RP 1057-1117, 14RP 1353-76; 13RP 1128-52, 1159-68; 14RP 1386-94, 1399-1403; 15RP 1410-1500.

Mr. Geier's counsel presented testimony from several witnesses about the positive changes they had seen in Mr. Geier over the years. Mr.

Geier's Buddhist teacher, Tad Mauney, had been providing counseling to Mr. Geier on a weekly basis for approximately fifteen years. 13RP 1128-30, 1134-35. Mr. Mauney testified about the positive changes he had seen in Mr. Geier over the years, including his ability to control his behavior and his attitude regarding his sexual offending. *See id.* at 1138-43, 1150-52. Mr. Geier's brother, Jeffrey Geier, also testified about the positive changes he had seen in his brother over the years since his involvement in both Buddhism and treatment. *See* 12RP 921-32.

David Hagstrom testified about the stability and support he would provide for Mr. Geier in the community. *See* 14RP 1386-1403. Rick Minnich administered a penile plethysmograph (PPG) test to Mr. Geier to assess any deviant sexual arousal. 11RP 878, 886-87. Mr. Minnich testified that Mr. Geier did not show any deviant sexual arousal. *See id.* at 894-900. On the contrary, he showed significant sexual arousal to non-deviant, consensual sex with an adult partner. *See id.* at 899-900.[4] Mr. Geier also testified on his own behalf at trial. 15 RP 1410. He testified, in part, about all the progress he has made over the years due to treatment. *See e.g.* 15RP 1146-48, 1473, 1488-99.[5]

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[4] Mr. Geier's mental abnormality is pedophilia, which means that he is sexually attracted to sexual activity with prepubescent children. 7RP 247-49, 312.

[5] Mr. Geier's video deposition was also admitted at trial. Ex. 26-30.

Dr. Halon testified in detail at trial about his credentials and qualifications as an expert witness. 12 RP 958-69. He testified about the professional licenses he holds, about the professional literature he has published, and about the professional presentations he has conducted. 12 RP 958-61, 967. He testified about being invited to join a task force to create protocol for the evaluation and treatment of sexual offenders. 12 RP 963. He also testified that he has evaluated "a couple thousand" sex offenders over the years. 12 RP 961.

Dr. Halon provided extensive testimony at trial that was favorable to Mr. Geier, including the following testimony: (1) that the PPG results verified Mr. Geier's statements that he had learned to switch his fantasies from children to adults and that his current sexual interests involve adults;[6] (2) that "the PPG was about as good of objective evidence as we could possibly have" that he has no arousal to children;[7] (3) that there is no evidence that Mr. Geier has any kind of mental disorder or that he had any self-control problems;[8] (4) that mentally disordered individuals can rarely get away with the types of crimes Mr. Geier committed;[9] (5) that there is

[6] 12RP 1021; 13RP 1114-15.

[7] 12RP 1021; 13RP 1116.

[8] 12RP 1051; 13RP 1093, 1096, 1105-07. The State had to prove beyond a reasonable doubt at trial that Mr. Geier had a mental abnormality or personality disorder that makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. *See* RCW 71.09.020(18).

[9] 12RP 1051.

no information in the record that indicates Mr. Geier is suffering from any form of mental disorder that will make reoffend against children;[10] and (6) that Mr. Geier does not suffer from a personality disorder and that there is no such thing as a personality disorder that predisposes a person to reoffend.[11] Dr. Halon also disputed, in great detail, many of the opinions of the State's expert witness. *See e.g.* 12RP 1014-20; 13RP 1067-88. Moreover, Mr. Geier's counsel conducted thorough cross-examinations of all the State's witnesses. *See* 8RP 409-42; 9RP 495-553, 560-70; 10RP 687-746; 11RP 767-862.

Based on all the circumstances and the totality of the record, counsel's representation was not deficient and Mr. Geier has not overcome the strong presumption that counsel was effective. Counsel's representation was reasonable under prevailing professional norms. *See Davis,* 152 Wn.2d at 673.

2. Mr. Geier Was Not Prejudiced by Counsel's Performance

Assuming arguendo that Mr. Geier could have met the first prong and shown that counsel's performance was deficient, the second prong of the *Strickland* test requires a showing that the deficient performance prejudiced Mr. Geier. *See Strickland,* 466 U.S. at 687. There must be a

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[10] *See* 13RP at 1107.
[11] *See* 13RP 1116-17.

showing of a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Brett,* 126 Wn.2d at 198. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Cienfuegos,* 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). Counsel's errors must be so serious as to deprive the defendant of a fair trial. *In re Elmore,* 162 Wn.2d 236, 252, 172 P.3d 335 (2007).

Mr. Geier was not prejudiced or deprived of a fair trial by brief tesitmony involving a minor disciplinary action that occurred *twelve years* prior to trial. Dr. Halon testified in detail about his qualifications, credentials, and experience that qualified him as an expert witness. *See* 12RP 958-71. The cross-examination involving the disciplinary issue was very brief and limited and involved only *two pages* of a 368-page transcript of Dr. Halon's testimony. *See* 13RP 1188-89, 1206-07.[12] Furthermore, the jury heard very minimal information about the complaint itself. The jury heard that a complaint was filed in 1998 and the parties reached a stipulated settlement where Dr. Halon agreed pay a fine, have his practice monitored for three years, and take an ethics course that he was required to take *regardless* of the settlement. 13RP 1189, 1206-07.

[12] Dr. Halon's entire testimony is located at 12RP 958-1051, 13RP 1057-1220, and 14RP 1259-1385.

The jury did not hear *any* evidence of the nature of the allegations in the complaint. *See* 13RP 1194-96. Furthermore, Dr. Halon testified that his license was never revoked and that his practice has "not been interrupted for a minute in the 30-something years I've had the license." 13RP 1189, 1207.

Mr. Geier argues that it cannot be said that the way the disciplinary history was presented to the jury, coupled with the State's closing argument, had no impact on the jury's decision. PRP at 25-26. However, similar to the brief and limited cross-examination on the disciplinary issue, the State's closing argument involving the disciplinary issue involved only six sentences in a thirty-nine page transcript. *See* 16RP 1638.

Taking into consideration all the favorable testimony Dr. Halon (and other witnesses) provided on Mr. Geier's behalf, Mr. Geier simply has not shown that there is a reasonable probability that the trial would have been different. *See Brett,* 126 Wn.2d at 198. Mr. Geier has not met either prong of the *Strickland* test. He fails to show that he was "actually and substantially prejudiced" by any error and is not entitled to any relief. *See Lord,* 123 Wn.2d at 303.

3. This Court Has Already Found that Mr. Geier Was Not Prejudiced by the Questioning of Dr. Halon

The issue of prejudice has already been considered and rejected by this Court. *See* Appendix 3 at 2-3. In his direct appeal, Mr. Geier argued that the trial court erred by denying his motion for a mistrial after the State cross-examined Dr. Halon about his disciplinary record without the trial court's prior approval. *Id.* at 2. This Court disagreed and held that Mr. Geier was not prejudiced by the questioning such that a new trial was warranted. *Id.* at 3. As such, this issue has been resolved, and Mr. Geier may not recast the same issue as an ineffective assistance claim. *See In re Pers. Rest. of Benn,* 134 Wn.2d 868, 905-06, 952 P.2d 116 (1998) (hereafter *Benn II*) (rejecting PRP claim where petitioner attempted to recast an issue previously rejected by the Court as an ineffective assistance of counsel claim).

B. Mr. Geier Received Effective Assistance of Appellate Counsel

1. Appellate Counsel Appropriately Used Her Professional Judgment in Deciding What Issues to Raise on Appeal

Mr. Geier argues that he received ineffective assistance of appellate counsel because (1) his attorney refused to raise an ineffective assistance of trial counsel claim on appeal; and (2) "continually misinformed him about relevant appeal processes[.]" PRP at 26-27. Mr. Geier's claims are meritless.

Mr. Geier appears to be suggesting that he has a right to decide what issues his appointed attorney raise on appeal. First, there is no right to the sort of "hybrid" representation to which Mr. Geier suggests he was entitled. *See State v. Harris,* 48 Wn. App. 279, 283, 738 P.2d 1059 (1987). Second, it is up to Mr. Geier's appointed attorney to decide what issues to raise on appeal. *See Stenson,* 142 Wn.2d at 733-34.

The United States Supreme Court, the Ninth Circuit, and the Washington Supreme Court have given counsel wide latitude to control strategy and tactics. *Id.* at 733. In the appeals context, an indigent appellant does not have a constitutional right to compel counsel to press nonfrivolous points requested by him on appeal, if counsel, as a matter of professional judgment, decides not to present those points. *Id.* citing *Jones v. Barnes,* 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983).

By providing counsel to indigent appellants, the Supreme Court recognized "the superior ability of trained counsel" in examining the record, researching the law, and marshalling arguments on the appellant's behalf. *Jones v. Barnes,* 463 U.S. at 751. The Constitution does not require appellate counsel to raise every colorable claim suggested by a client:

> For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders.* Nothing in the Constitution or our interpretation of that document requires such a standard.

See Stenson, 142 Wn.2d at 734 quoting *Jones v. Barnes,* 463 U.S. at 754. Thus, Mr. Geier's appellate counsel was not required to raise the ineffective assistance of counsel claim allegedly suggested by Mr. Geier.[13]

The "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray,* 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L.Ed.2d 434 (1986) citing *Jones v. Barnes,* 463 U.S. at 751-52. Although it is possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, it is difficult for the appellant to demonstrate that counsel was incompetent. *Smith v. Robbins,* 528 U.S. 259, 288, 120 S. Ct. 746, 145 L.Ed.2d 756 (2000) citing *Gray v. Greer,* 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.").

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[13] It should be noted that Mr. Geier has not provided any letter, records, or affidavits indicating that he actually made this request to his appellate counsel.

Mr. Geier has not met either prong of the *Strickland* test. There is a strong presumption that counsel's representation was effective. *Davis,* 152 Wn.2d at 673. Mr. Geier has not met his burden of establishing that his appellate counsel's performance was deficient. *See McFarland,* 127 Wn.2d at 335. Mr. Geier's counsel was entitled to use her own professional judgment in deciding what issues to raise on appeal. *See Stenson,* 142 Wn.2d at 733. This is exactly what appellate counsel did when she chose to address Dr. Halon's disciplinary issue in terms of the State's error in cross-examining Dr. Halon about it in violation of a motion in limine, as opposed to addressing the disciplinary issue as an error made by Mr. Geier's trial counsel.[14] Under *Stenson,* this was well within appellate counsel's professional judgment and does not amount to ineffective assistance of counsel. *See Stenson,* 142 Wn.2d at 733-34.

As previously discussed, the ineffective assistance of trial counsel claim has no merit. This Court has already determined that Mr. Geier was not prejudiced by the cross-examination into Dr. Halon's disciplinary issue. *See* Appendix 3 at 3. Thus, trial counsel could not have been ineffective for using Dr. Halon as an expert. It follows that appellate

[14] In the direct appeal, the Court of Appeals indicated that the "State violated the order in limine by beginning to question Dr. Halon about a prior bad act before making the required offer of proof." Appendix 3 at 3. Thus, appellate counsel identified an appropriate appellate issue to pursue.

counsel also could not have been ineffective for failing to raise an issue lacking merit.

2. Appellate Counsel Appropriately Informed Mr. Geier of the Appellate Process

First, Mr. Geier fails to provide any affidavits or other corroborating evidence that his counsel ultimately decided not to file a petition for discretionary review based solely on her belief that her appointment did not extend to the Supreme Court. Mr. Geier must present factual evidence that his allegations are based on more than just speculation or conjecture. *See Rice,* 118 Wn.2d at 886.

Second, despite the fact that Mr. Geier's appellate counsel was allowed to file a petition for discretionary review, she was not required to do so. The Supreme Court accepts review only in very limited circumstances. RAP 13.4(b).[15] There is no indication, or argument by Mr. Geier, that his case falls into any of limited situations where the Supreme Court accepts review. In fact, this case does not appear to fall under any of the criteria appropriate for review under RAP 13.4(b).

Furthermore, appellate counsel informed Mr. Geier that after reviewing the Court's opinion and the record in his case, she did "not

[15] The Supreme Court will accept review of a Court of Appeals decision only if (1) the decision is in conflict with a Supreme Court decision; (2) the decision is in conflict with another decision of the Court of Appeals; (3) a significant question of law under the constitution is involved; or (4) the petition involves an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b).

believe the Court will reconsider its decision[.]" *See* PRP, Appendix C (letter dated April 12, 2013). Considering counsel's professional judgment was that the Court of Appeals would not decide in favor of Mr. Geier, it certainly seems reasonable that counsel reached the same conclusion about the Supreme Court, particularly in light of the limited situations for review under RAP 13.4(b). Given the strong presumption of counsel's competence, Mr. Geier's appellate counsel arguably knew there were no grounds for review after reading this Court's decision in the direct appeal. Nevertheless, appellate counsel advised Mr. Geier that he could proceed pro se if he wanted to pursue certain issues and advised him on how to do that and what the deadlines were. *See* PRP, Appendix C (letter dated April 12, 2013).

Finally, even if counsel was mistaken about the extent of her appointment, there is no indication from the facts or evidence submitted by Mr. Geier that this mistaken belief was the reason a petition for discretionary review was ultimately not filed. Mr. Geier has not presented any facts or affidavits to support his conclusory allegations; rather, his claims are based on speculation and conjecture, which is insufficient to justify relief. *See Rice,* 118 Wn.2d at 885-86; *see also Cook,* 114 Wn.2d at 813-14 ("Where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies solely on

conclusory allegations, a court should decline to determine the validity of a personal restraint petition.")

C. RAP 10.10(a) Only Permits Filing A Statement Of Additional Grounds For Review In Criminal Cases

RAP 10.10(a) explicitly states that the rule applies only to *criminal* cases:

> In a criminal case on direct appeal, the defendant may file a pro se statement of additional grounds for review to identify and discuss those matters related to the decision under review that the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel.

RAP 10.10(a). Mr. Geier's appellate counsel accurately informed Mr. Geier that filing a statement of additional grounds for review "is only permitted in criminal cases, not civil commitment cases[.]" *See* PRP, Appendix C (March 14, 2012 letter). The rule limiting this to criminal cases does not violate Mr. Geier's due process or equal protection rights.

1. It is Well Established That the SVP Statute is Civil, Not Criminal, in Nature

Washington's SVP statute is civil, not criminal, in nature. *In re Young,* 122 Wn.2d 1, 18-23, 857 P.2d 989.[16] It is well established that there are valid reasons for treating SVPs and criminal defendants differently. Unlike individuals who are convicted of a crime and sent to

[16] A portion of the *Young* decision has been superseded by statute on other unrelated grounds.

prison, SVPs are committed solely for treatment purposes and must be released as soon as they are no longer mentally ill and dangerous. *See id.* at 20-21. "[T]he goals of civil and criminal confinement are quite different; the former is concerned with incapacitation and treatment, while the latter is directed to retribution and deterrence." *Id.* at 21; *see also Seling v. Young,* 531 U.S. 250, 261, 121 S. Ct. 727, 148 L.Ed.2d 734 (2001); *Kansas v. Hendricks,* 521 U.S. 346, 361-63, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997) (SVP act does not implicate retribution or deterrence).

The SVP statute is not concerned with the criminal culpability of the individual's past actions; rather, the focus is on treating that individual for a current mental abnormality. *Young,* 122 Wn.2d at 21. The SVP commitment scheme serves no punitive purposes. *Id.* at 25. By contrast, the United States Supreme Court has repeatedly said that retribution and deterrence are punitive, and thus are the goals of criminal law. *Id.* at 22 citing *U.S. v. Halper,* 490 U.S. 435, 448, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989). The purpose of the SVP statute is to hold the person only as long as he is mentally ill and dangerous. *Kansas v. Hendricks,* 521 U.S. at 363-64.

Moreover, criminal constitutional protections are not applicable to SVPs beyond those supplied in the SVP statute and those granted in *Young. In re Det. of Twining,* 77 Wn. App. 882, 895, 894 P.2d 1331

(1995), abrogated on other grounds by *In re Det. of Pouncy,* 168 Wn.2d 382, 229 P.3d 678 (2010). The State's decision to provide some of the procedural safeguards applicable in criminal trials does not turn SVP proceedings into criminal prosecutions. *See Kansas v. Hendricks,* 521 U.S. at 364-65.[17]

2. Limiting RAP 10.10(a) to Criminal Cases Does Not Violate Mr. Geier's Due Process or Equal Protection Rights

Equal protection principles of the Fourteenth Amendment and article I, section 12 of Washington's constitution require that similarly situated persons receive similar treatment under the law. *Young,* 122 Wn.2d at 44. However, equal protection does not require that all persons be dealt with identically; rather, it requires that a distinction made have some relevance to the purpose for which the classification is made. *Id.* at 45. The distinct goals of the SVP commitment scheme justify treating SVPs differently from criminal defendants. For the reasons articulated above, SVPs and criminal defendants are not similarly situated classes of people.

Under the rational basis test, a court must determine whether (1) all members of the class are treated alike; (2) reasonable grounds exist to

[17] *Kansas v. Hendricks* involves the Kansas SVP Act, which was modeled after Washington's SVP Act and is "strikingly similar." *See Seling v. Young,* 531 U.S. at 260-61.

justify the exclusion of parties who are not within the class; and (3) the classification bears a rational relationship to a legitimate purpose. *State v. Jagger,* 149 Wn. App. 525, 532, 204 P.3d 267 (2009). The burden is on the challenger to show that the classification is purely arbitrary. *In re Det. of Turay,* 139 Wn.2d 379, 410, 986 P.2d 790 (1999). A legislative classification will be upheld against an equal protection challenge unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. *Id.* It will also be upheld if there is any conceivable set of facts that could provide a rational basis for the classification. *Gossett v. Farmers Ins. Co. of Washington,* 133 Wn.2d 954, 979, 948 P.2d 1264 (1997).

As previously discussed, there is a rational basis for treating SVPs and criminal defendants differently. The purpose of the SVP statute is to treat mentally ill individuals, and SVPs are only held as long as they continue to be mentally ill and dangerous. *See Young,* 122 Wn.2d at 20-21. The State has a compelling interest in treating SVPs and protecting society from their actions. *Id.* at 26.

Once a defendant is convicted and sentenced in a criminal case, he must serve the sentence given to him by the court. Unlike criminal defendants, SVPs are entitled to an annual review process where they have yearly hearings before the court to determine whether they continue to be

mentally ill and dangerous or should be released. *See* RCW 71.09.070. Thus, Mr. Geier's equal protection claim has no merit as there is a rational basis for treating SVPs differently from criminal defendants.

Although Mr. Geier is not entitled to file a statement of additional grounds for review in this civil proceeding, he is still entitled to pursue other appellate avenues. In fact, appellate counsel explicitly informed Mr. Geier that he could proceed pro se and file both a motion for reconsideration in the Court of Appeals and a petition for review in the Supreme Court. PRP, Appendix C (April 12, 2013 letter). Counsel sent Mr. Geier the relevant portions of the Rules of Appellate Procedure to assist him in that process. *Id.* Counsel informed him that he could raise the ineffective assistance of counsel issue in his petition for review. *Id.* She also informed him of the deadlines in which to file these pleadings. *Id.*

Rather than utilize any of these options, Mr. Geier elected to file a PRP. In this PRP, he raises the very issue he claims that he is being denied by not being permitted to file a statement of additional grounds for review. The ineffective assistance of counsel issue is before this Court in this PRP. Thus, he had various avenues to address this issue and he chose one by filing a PRP. This is no way violates any due process or equal protection rights. There is simply no "denial of access to the justice

system" as Mr. Geier alleges. *See* PRP at 35-36. This Court should deny Mr. Geier's PRP.

VI. CONCLUSION

The Respondent respectfully requests that the Court deny Mr. Geier's PRP. None of his claims merit relief.

RESPECTFULLY SUBMITTED this 4th day of May, 2015.

ROBERT W. FERGUSON
Attorney General

KRISTIE BARHAM
Assistant Attorney General
WSBA #32764/OID #91094

Appendix 1

Barham, Kristie (ATG)

From:	Helen Whitener [whitenerh@wrwattorneys.com]
Sent:	Monday, January 31, 2011 10:58 AM
To:	Barham, Kristie (ATG)
Cc:	'Lynn Rainey'
Subject:	[redacted]

Kristie, we recently received some information regarding Dr. Halon which will require we request a 2nd expert on this case. We were informed of a 1995 disciplinary action and a recent matter where our client Mr. C[redacted] was mentioned in an evaluation Dr. Halon did for one of his other client's. Let me know if you would be objecting to our request and if you are then we will schedule a motion to address this issue.

Thanks,

G. Helen Whitener

WHITENER RAINEY PS
820 Sixth Avenue, Suite A
Tacoma, WA 98405
Office: (253) 830-2155

Appendix 2

NO. 45540-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of: PAUL ANDREW GEIER, Petitioner, v. STATE OF WASHINGTON, Respondent.	DECLARATION OF KRISTIE BARHAM

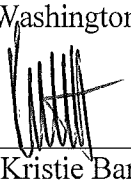
I, KRISTIE BARHAM, make the following declaration:

1. I am an Assistant Attorney General and am assigned to represent the State of Washington in this case.
2. Based on a review of records retained by the Attorney General's office, Dr. Halon has been retained by the defense as an expert witness in the following sexually violent predator cases: John Keeney (2012); Maverick Lanning (2010); Jason Muns (2005); Jeffrey Payne (2010); Michael Phillips (2009); Steven Ritter (2007); John Robinson (2001); Samuel Sparks (2009); and Wayne Thoday (2008).[1]

[1] This list is in addition to the published and unpublished cases cited in footnote 3 of the State's Response to the PRP. The years reflected represent when the State received an evaluation or consult information from Dr. Halon, not necessarily the year he was first retained. This is not an exclusive list of cases where Dr. Halon has been retained in Washington State.

I declare under penalty of perjury, under the law of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

DATED the 4th day of May, 2015 at Seattle, Washington.



Kristie Barham

Appendix 3

Not Reported in P.3d, 174 Wash.App. 1036, 2013 WL 1489825 (Wash.App. Div. 2)
(Cite as: 2013 WL 1489825 (Wash.App. Div. 2))

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.
In the Matter of the **DETENTION** OF Paul Andrew **GEIER**, Petitioner.

No. 42292–1–II.
April 9, 2013.

Appeal from Pierce County Superior Court; Hon. Kathryn J. Nelson.
Valerie Marushige, Attorney at Law, Kent, WA, for Appellant.

Kristie Barham, Kent Y. Liu, Office of the Attorney General, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

WORSWICK, C.J.

***1** Paul Andrew Geier appeals an order of civil commitment following a jury determination that he is a sexually violent predator. Geier argues that the trial court (1) erroneously denied his motion for a mistrial and (2) violated his right to a public trial. We affirm.

FACTS

A. *Prior Bad Acts Evidence and Motion for Mistri- al*

Before Geier's trial, the State filed a motion in limine, "based on ER 403, ER 608, and ER 609," to prohibit "any evidence of any alleged bad acts or crimes of any of [the State's] witnesses .... unless and until this Court rules such evidence admissible after an offer of proof or hearing is held outside the presence of the jury." Clerk's Papers (CP) at 666. Geier agreed to this motion, provided that it applied to both parties' witnesses, except Geier himself. The trial court entered an order in limine granting the motion as modified.

During the trial, both parties called expert witnesses to testify about whether Geier had a mental abnormality or personality disorder. The State called Dr. Harry Hoberman, a forensic and clinical psychologist. Dr. Hoberman testified that he evaluated Geier and diagnosed him with pedophilia and antisocial personality disorder. Dr. Hoberman also opined that the diagnosed conditions and a lack of self-control made Geier more likely than not to commit more predatory acts of sexual violence, unless he was confined.

Geier called Dr. Robert Halon, a psychologist and marriage family therapist. Dr. Halon criticized some of the methods Dr. Hoberman had used to evaluate Geier. Dr. Halon also opined that Geier did not suffer from any personality disorder that would cause Geier to meet the criteria of a sexually violent predator.

On direct examination, Dr. Halon testified that he was "a licensed psychologist [in California] since 1977." 9 Verbatim Report of Proceedings (VRP) (June 7, 2011) at 958. On cross-examination, the State asked Dr. Halon whether he had entered into a stipulated order in a disciplinary action commenced by the California Board of Psychology. Dr. Halon answered affirmatively. Dr. Halon also testified that the stipulated order said it revoked his license, but that the order was immediately stayed. The State then asked about the underlying allegations in the disciplinary action.

Before Dr. Halon could answer, Geier objected and argued that the questioning violated the order in limine by referring to Dr. Halon's prior bad acts. Outside the presence of the jury, the State made an offer of proof that (1) the allegations involved failing to report a client's sex offense as required by law, incorrectly billing the state for services, and misrepresenting the results of tests; and (2) the stipulated order imposed three years of probation, and

required Dr. Halon to take an ethics course and pay a fine. Contending that the offer of proof came too late to prevent the damage, Geier moved the trial court to declare a mistrial.

Even though the State elicited evidence from Dr. Halon regarding his prior disciplinary record before seeking a ruling by the trial court, the trial court denied the motion for mistrial. The trial court stated that the order did not prohibit the admission of all prior bad act evidence, but instead "meant that we would follow a procedure, which we are now following." 10 VRP (June 8, 2011) at 1204. The trial court determined that the State's questioning would yield "precisely the type of information that is allowed in order to have the jury fully and fairly evaluate the expert witness." 10 VRP (June 8, 2011) at 1204. Accordingly, the trial court overruled Geier's objection and allowed the State to inquire about the allegations for which Dr. Halon was disciplined.

*2 After the parties rested, the jury returned a verdict finding that Geier was a sexually violent predator. The trial court then entered an order of commitment.

B. *Voir Dire and Jury Questionnaires*

Before Geier's jury trial began, the trial court directed the potential jurors to complete a questionnaire, to which the parties agreed. The questionnaire required the potential jurors to identify themselves by name and "to disclose such sensitive information as whether they had been [victims] of sexual abuse or received mental health counseling." CP at 610; *see* CP at 702–10 (blank questionnaire). In open court, the trial court and the parties' counsel reviewed the completed questionnaires and conducted individual voir dire. After the verdict, the trial court entered an agreed order sealing the jury questionnaires and stating that the trial court conducted the analysis described in *State v. Bone–Club,* 128 Wn.2d 254, 906 P.2d 325 (1995), and *Seattle Times Co. v. Ishikawa,* 97 Wn.2d 30, 640 P.2d 716 (1982).

Geier appeals.

ANALYSIS

I. MOTION FOR MISTRIAL

Geier first argues that the trial court erred in denying his motion for a mistrial. We disagree.

A trial court should grant a motion for mistrial only when the harmed party has been so prejudiced by an irregularity that only a new trial can remedy the error. *Kimball v. Otis Elevator Co.,* 89 Wn.App. 169, 178, 947 P.2d 1275 (1997). We review the denial of a motion for a mistrial for an abuse of discretion. *Adkins v. Aluminum Co. of Am.,* 110 Wn.2d 128, 136, 750 P.2d 1257 (1988). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Dix v. ICT Group, Inc .,* 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Geier contends that a new trial is required to remedy the irregularity that occurred when the State violated the order in limine by asking Dr. Halon about his disciplinary record without the trial court's prior approval. We disagree. [FN1]

> FN1. Geier does not argue that the trial court made the wrong decision after the State submitted its offer of proof. Geier argues only that the questioning violated the motion in limine by proceeding to cross-examine Dr. Halon without *first* notifying the trial court about the alleged prior bad act and allowing the court to rule on the evidence's admissibility.

A violation of an order in limine is not necessarily grounds for mistrial. *State v. Clemons,* 56 Wn.App. 57, 62, 782 P.2d 219 (1989). In determining whether an irregularity caused prejudice warranting a mistrial, we examine (1) the seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court gave a proper curative instruction. *State v. Hopson,* 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); *In re Det. of Smith,* 130 Wh.App. 104, 113, 122 P.3d 736 (2005). Here, the parties do not dispute that the questioning did not elicit cumulative

evidence and that the trial court gave no curative instruction. Thus, we examine only the seriousness of the irregularity here.

Citing *State v. Easter,* 130 Wn.2d 228, 242 n. 11, 922 P.2d 1285 (1996), Geier argues that the State's violation of the order in limine was a serious irregularity warranting mistrial. But *Easter* is distinguishable. In *Easter,* an arresting officer testified that the defendant behaved like a " 'smart drunk' " after a car accident, thus violating an order in limine prohibiting such commentary and insinuating the defendant's guilt. 130 Wn.2d at 242. Although the *Easter* court disapproved of the violation, it expressly declined to hold that *every* violation of an order in limine warrants a new trial. 130 Wn.2d at 242 n. 11. Instead, the *Easter* court stated that a violation " *may* be so flagrantly prejudicial as to be incurable by instruction." 130 Wn.2d at 242 n .11 (emphasis added).

***3** In contrast, the violation here was not nearly so serious. The State violated the order in limine by beginning to question Dr. Halon about a prior bad act before making the required offer of proof. When Geier objected, the State made the required offer of proof, and the trial court allowed the questioning to proceed. Unlike *Easter,* where the State elicited testimony that the trial court specifically excluded, here the jury heard evidence that the trial court ultimately admitted. Moreover, Geier does not argue that admission of the evidence was error.

Instead, Geier argues that the violation of the order in limine prejudiced him because (1) the jury heard the State's questioning before Geier could dispute the evidence's admissibility; (2) if Geier had known that Dr. Halon's disciplinary record would be an issue, Geier could have mitigated its impact by inquiring about it on direct examination; (3) the violation precluded the trial court from conducting an ER 403 analysis; and (4) the prior bad act evidence was prejudicial to Geier's case. We hold that the violation did not cause any prejudice, let alone prejudice for which a new trial is the only available remedy.

First, Geier argues he suffered prejudice because he could not dispute the admissibility of prior bad act evidence before the State began questioning Dr. Halon about it. We disagree. After Geier objected, he still had a full opportunity to argue that the trial court should not admit the evidence. Because the trial court ultimately admitted the evidence, the State's premature questioning did not prejudice Geier.

Second, Geier argues that he was prejudiced by losing an opportunity to mitigate the prior bad act evidence by addressing it on direct examination. This argument fails because the order in limine required the offer of proof to come before the *questioning;* it did not require the offer of proof to come before Geier had finished direct examination. Thus the order did not secure Geier's opportunity to address the issue on direct examination.

Third, Geier contends that the violation "deprived Geier of the opportunity to argue that even if relevant, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice." Reply Br. of Appellant at 6. This contention lacks merit. Again, Geier had an opportunity to make this argument to the trial court while contesting the admissibility of the prior bad act evidence. Even though the trial court reiterated that ER 403 was a basis of the order in limine, Geier did not argue that the danger of unfair prejudice substantially outweighed the probative value of the evidence.

Finally, Geier argues that he was prejudiced by the prior bad act evidence involving Dr. Halon, who was a key witness. But the State elicited admissible evidence of Dr. Halon's prior bad acts. This is not an irregularity. Only prejudice resulting from an irregularity can be grounds for a mistrial. *See Kimball,* 89 Wn.App. at 178. Because the State's violation did not cause prejudice warranting a new trial, the trial court did not abuse its discretion in denying Geier's motion. *See Dix,* 160 Wn.2d at 833; *Adkins,* 110 Wn.2d at 136. Geier's argument fails.[FN2]

FN2. For the first time in his reply brief, Geier argues that he was deprived the effective assistance of counsel because his trial attorney called Dr. Halon as an expert despite knowing of his prior disciplinary record. But this court does not consider arguments—even constitutional arguments—that are made for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Oostra v. Holstine,* 86 Wn.App. 536, 543, 937 P.2d 195 (1997).

II. RIGHT TO A PUBLIC TRIAL

***4** Geier next argues that he is entitled to a new trial because the trial court violated the Washington Constitution when it sealed the jury questionnaires without conducting a sufficient *Bone–Club* analysis.[FN3] We disagree.

FN3. In their briefs, both parties consented to postpone consideration of this appeal while our Supreme Court reviewed the decision in *State v. Beskurt,* 159 Wn.App. 819, 246 P.3d 580, *review granted,* 172 Wn.2d 1013 (2011). In addition, the State requested that the stay remain in effect pending review of *State v.. Paumier,* 155 Wn.App. 673, 230 P.3d 212, *review granted,* 169 Wn.2d 1017 (2010). Because our Supreme Court has decided both cases, there is no longer any basis for a stay. *State v. Beskurt,* 176 Wn.2d 441, 293 P.3d 1159 (2013); *State v. Paumier,* 176 Wn.2d 29, 288 P.3d 1126 (2012).

The Washington Constitution protects the public's right to the open administration of justice and a criminal defendant's right to a public trial. WASH. CONST. art. I, §§ 10, 22.[FN4] But these rights are not absolute; a trial court may close a courtroom if closure is warranted under the five-part test set forth in *State v.. Bone–Club,* 128 Wn.2d 254, 906 P.2d 325 (1995),[FN5] and *Seattle Times Co. v. Ishikawa,* 97 Wn.2d 30, 640 P.2d 716 (1982). Whether the closure of a proceeding violates article I, section 10 or section 22 of the Washington Constitution is a question of law reviewed de novo. *State v. Momah,* 167 Wn.2d 140, 147, 217 P:3d 321 (2009).

FN4. The State does not challenge Geier's assumption that article I, section 22 applies in this civil commitment trial. We recognize that article I, section 22 refers only to "criminal prosecutions," and Division One of this court has held that it does not apply in civil commitment trials. *In re Det. of Ticeson,* 159 Wn.App. 374, 381, 246 P.3d 550 (2011), *abrogated on other grounds by State v. Sublett,* 176 Wn.2d 58, 72, 292 P.3d 715 (2012). In addition, our Supreme Court has not resolved whether a defendant has standing to assert the public's right to the open administration of justice under article I, section 10. *State v. Wise,* 176 Wn.2d 1, 16 n. 9, 288 P.3d 1113 (2012).

FN5. The five criteria are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

> *Bone–Club,* 128 Wn.2d at 258–59 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry,* 121 Wn.2d 205, 210–11, 848 P.2d 1258 (1993)) (alteration in original).

Geier is not entitled to a new trial, given our Supreme Court's decision in *State v. Beskurt,* 176 Wn.2d 441, 293 P.3d 1159 (2013). In *Beskurt,* the trial court sealed jury questionnaires without applying the *Bone–Club* test. 293 P.3d at 1160. A four-justice plurality and a separate concurrence by Justice Stephens each concluded, for two different reasons, that the defendants were not entitled to a new trial. *Beskurt,* 293 P.3d at 1162 (plurality opinion), 1168 (Stephens, J., concurring).[FN6] Both reasons defeat Geier's argument.

> FN6. Chief Justice Madsen, in another concurrence signed by two other justices, would have found that the defendants waived their public trial argument. *Beskurt,* 293 P.3d at 1166. Thus Chief Justice Madsen's opinion did not address the public trial argument.

First, under the reasoning of the *Beskurt* plurality, the *Bone–Club* test does not apply here because sealing jury questionnaires is not a courtroom closure. Although a trial court must apply the *Bone–Club* test before closing voir dire to the public, *State v. Paumier,* 176 Wn.2d 29, 35, 288 P.3d 1126 (2012), the plurality concluded that a trial court need not apply the *Bone–Club* test when sealing jury questionnaires that were completed before voir dire began. *Beskurt,* 293 P.3d at 1162. Here, the jury questionnaires were completed before voir dire began, and all voir dire questioning occurred in open court. Therefore, on the plurality's reasoning, sealing the jury questionnaires cannot have violated either the public's right to the open administration of justice or Geier's right to a public trial. *Beskurt,* 293 P.3d at 1162.

Second, under Justice Stephens's reasoning, sealing jury questionnaires is a courtroom closure but a new trial is unwarranted here even if the trial court failed to apply the *Bone–Club* test. *Beskurt,* 293 P.3d at 1166–67. Justice Stephens concluded that, when a trial court seals jury questionnaires after the trial has ended, a failure to apply the *Bone–Club* test is not grounds for a new trial. *Beskurt,* 293 P.3d at 1168. Here, the trial court sealed the jury questionnaires after the trial ended. Therefore a new trial is unwarranted here. *Beskurt,* 293 P.3d at 1168. Geier's argument fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur: VAN DEREN, and PENOYAR JJ.

Wash.App. Div. 2,2013.
In re Detention of Geier
Not Reported in P.3d, 174 Wash.App. 1036, 2013 WL 1489825 (Wash.App. Div. 2)

END OF DOCUMENT

Appendix 4

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

IN RE: THE DETENTION OF	)	
	)	
MANUEL LOPEZ, JR.,	)	No. 07-2-07273-5
	)	
Respondent.	)	

TELEPHONIC DEPOSITION UPON ORAL EXAMINATION OF
ROBERT HALON, Ph.D.

2:00 p.m.
Tuesday, May 18, 2010
800 Fifth Avenue
Suite 2000
Seattle, Washington

KIMBERLY MIFFLIN, CSR
NORTHWEST COURT REPORTERS
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person's personality, even, while it may not disappear entirely and turn into something else, the behavioral manifestations of the personality begin to disappear. That's even true for antisocial personality disorder. It's true for any kind of criminal activity. And, in fact, it's true for everything in life actually.

Q. What about for someone like Mr. Lopez who started offending back in the 70's and offended again in the 90's and then 2000's; what about someone like that?

A. I don't understand your question.

Q. Well, as it relates to aging.

A. Well, I think he's only now approaching an age where we can begin to see those proclivities decline substantially. I don't think up to now it really has been. He's in pretty good shape, he keeps himself in pretty good shape, he's pretty sharp. You can listen to him talk, he's very clear. There is no frailty in him.

But the decline in all those negative behaviors is pretty much cross the board for everybody, whether in good health or not. There is just some aspects that change over time.

Q. Dr. Halon, I'm going to sort of switch gears now and I'm going to talk about some of the licensing issues you've had. You're licensed in California; is that correct?

A. Yes, that's correct.

Q. Are you also licensed in Washington state?
A. No, I have a temporary permit.
Q. And you've had some issues with your license in California; is that correct?
A. Well, no, not my license. I've had issues with the board.
Q. And the Board of Psychology in California is an agency that is in charge of complaints made against psychologists; is that correct?
A. Yes, correct.
Q. And they are also charged with investigating those complaints; is that correct?
A. Correct. Maybe I can short circuit this. I think you have this information in every case I've testified in in Washington except a couple. And I think, you know, my answers are going to be the same. So if you want to -- I think you can consult those or we can go through the whole thing.
Q. Why don't you just allow me to continue on here.

I guess in November of '98 the Board of Psychology filed a complaint against you; is that correct?

A. Correct.
Q. And I guess the complaints are called accusations.
A. Yes, that's right, because it's administrative stuff. It has nothing to do with criminality or anything like that.

Q. In September of 1999 you entered into a stipulation settlement and disciplinary order with the Board of Psychology regarding the charges filed against you; is that correct?

A. Regarding the accusations. There were no charges.

Q. Okay, accusations.

A. Correct.

Q. And you were represented by counsel during those proceedings?

A. That's correct.

Q. And pursuant to that settlement, you agreed that at a hearing complainant, Board of Psychology, could establish a factual basis for the charges in the accusation and that you hereby give up your right to contest those charges; is that correct?

A. Yes. I thought they could do that without my input.

Q. The first charge which you agreed to be factually established in which you gave up the right to contest was for a gross negligence; is that correct?

A. No, there were no factual findings on me ever. This was a no admission stipulation. I have never been found to be unethical in any way. That's never been adjudicated.

As a matter of fact, right after I entered that stipulation since I did not get an opportunity to present my side of the issues, I wrote a formal letter to the

American Psychological Association Ethics Committee and asked them to open a formal case so that this could be heard.

And I got a letter back from them that said they had received all of the material from the Board of Psychology in California, and that even if everything that they alleged was true, none of it was sufficient for them to open an ethics case against me. And then they listed the things that would qualify for opening such a case, which was none of what I was alleged to have done.

So there was never any factual finding; there was any never admission. This was a stipulation entered into to make this go away. The judge told me -- in fact, we put in the stipulation, Item 10, that the information could not be used in any civil or criminal case.

I naively thought that that meant that this issue could never be brought up. So to save myself a lot of time and misery -- I'd never been through anything like that before, never been accused of anything like that before -- I decided to stipulate and get it behind me.

When I was able to lobby the Board of Psychology to terminate my stipulation early, I had a full hearing in Los Angeles, and following that hearing they terminated the stipulation early.

Q. I guess my question was the accusation in paragraph 4

alleged that you were guilty or you were accused of unprofessional conduct, and that was for gross negligence. Is that what the accusation stated?

A. Correct.

Q. And another charge was --

A. Another allegation.

Q. Another allegation, I'm sorry.

A. Accusation.

Q. Yes, accusation was for falsely and dishonestly -- dishonesty in billing, in some type of billing; is that correct?

A. Yes, that's correct.

Q. And another accusation was that there was repeated negligent acts; is that correct?

A. There were several in there. There was the one about failing to make a mandatory report of suspected child abuse. There was the one where they said by using a different code than the HMO was using, I was guilty of some kind of fraud or I was suspected of fraud. And there was one about misinterpreting tests, psychological tests.

I think that was the bulk of it.

Q. And as a result of the settlement you entered into with the Board of Psychology, you were put on probation for three years; is that correct?

A. Yes, I stipulated that, that is correct. And as I said, I got off of that almost a year early.
Q. And during your probation you had to be monitored by another psychologist; is that correct?
A. Yes, that's monitored, not supervised. I was never under supervision. His job was just to monitor my records, monitor how I was doing, my practice actually.
Q. And you had to meet with him on a regular basis, the monitor?
A. Yes, correct.
Q. And were you also required --
A. The Board picked him out.
Q. I'm sorry, I missed that.
A. The Board selected him.
Q. Were you also required to tell your patients that you had been put on probation?
A. I think so, yeah, because I had all my patients -- yeah, they were informed, and then they signed a consent so that my monitor could look at their records if he wanted to.
Q. As part of your probation, were you required to take a professional ethics examination?
A. Yes. I had to do that anyway, so that was no big deal. I just took it sooner rather than later.
And also, I had to take a course, and then they had

me take the test too.

Q. And that was called Law and Ethics as they relate to the practice of psychology?

A. Correct.

MR. LIU: Dr. Halon, thank you very much. I have no further questions.

THE WITNESS: Thank you.

MR. O'MELVENY: Dr. Halon, you have a right to read this to see if there is any transcription errors, although realistically, I don't know if there's going to be time, if it's typed up, for you to do that. We'll certainly get you a copy before you were going to testify.

Do you want to waive that right to read it?

THE WITNESS: No, no way.

MR. O'MELVENY: I'm not sure we'll be able to get it to you for corrections before your testimony, but I guess we'll do the best we can.

THE WITNESS: What happens then if I have to testify before I have a chance to review it?

MR. O'MELVENY: What I'm saying is, once it's ordered, we'll immediately ship it down to you. But what I'm also saying is I don't know that you will have time to make corrections and get them back to the transcriptionist, because I'm thinking it's going to take

NO. 45540-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of: PAUL ANDREW GEIER, Petitioner, v. STATE OF WASHINGTON, Respondent.	DECLARATION OF SERVICE

I HEREBY CERTIFY that on the 4th day of May, 2015, I served true and correct copies of the State of Washington's Response to Brief in Support of Personal Restraint Petition and Declaration of Service by depositing same in the United States Mail, first-class delivery, postage prepaid and addressed as follows:

Stephanie Cunningham
Attorney for Appellant
4616 25th Avenue NE, No. 552
Seattle, WA 98105

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 4th day of May, 2015.

LISSA TREADWAY
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

May 04, 2015 - 3:23 PM

Transmittal Letter

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Court of Appeals Case Number: 45540-4

Is this a Personal Restraint Petition? Yes ■ No

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Sender Name: Lissa Y Treadway - Email: lissat@atg.wa.gov